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7  
8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 In re: ) Case No. 13-53491  
12 272 E SANTA CLARA GROCERY, LLC, ) CHAPTER 11  
13 Debtor. ) **AMENDED OBJECTION TO PROOF**  
14 ) **OF CLAIM OF BOSTON PRIVATE**  
15 ) **BANK & TRUST COMPANY**  
16 ) **(Claim No. 2)**  
17 )  
18 )

18 TO THE HONORABLE STEPHEN L. JOHNSON, UNITED STATES BANKRUPTCY  
19 COURT JUDGE; THE OFFICE OF THE UNITED STATES TRUSTEE; BOSTON  
20 PRIVATE BANK & TRUST COMPANY; and all other interested parties:  
21

22 COMES NOW, Debtor 272 E. Santa Clara Grocery, LLC (“Debtor”) and objects to  
23 Boston Private Bank & Trust Company’s, a successor of interest to Borel Private Bank and  
24 Trust Company (“BPB”), Proof of Claim No. 2 filed October 22, 2013 (“BPB Claim”) as  
25 follows (“Objection”)<sup>1</sup>:  
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28 <sup>1</sup>This objection amends the Objection filed on October 28, 2013 (Docket#88).

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<sup>2</sup>Debtor apologizes for unanticipated technical difficulties relating to page numbering.

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4 **TABLE OF AUTHORITIES**

5 **CASES**

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7 Cir. Cal. 2001)  
8 Chodus v. West Publishing Co., 292 F.3d 992, 1002 (9<sup>th</sup> Cir. 2002)  
9 Darling Int'l, Inc. v. Baywood Partners, Inc., 2007 U.S. Dist. LEXIS 50985 (N.D. Cal. July  
10 13, 2007)  
11 Dean Witter Reynolds v. Superior Court, 211 Cal.App. 3d 758 (Cal. App. 1st Dist. 1989)  
12 Del Hur, Inc. v. Nat'l Union Fire Ins. Co., 94 F.3d 548 (9th Cir. 1996)  
13 Donicker Corp. v. Pittsburgh Nat'l Bank, 1994 U.S. App. LEXIS 31528 (9th Cir. Guam Nov.  
14 9, 1994)  
15 Edwards v. Aetna Life Ins. Co., 690 F.2d 595 (6th Cir. 1982)  
16 Garcia v. World Savings, FSB, 183 Cal. App. 4th 1031, 1045 (Cal. App. 2d Dist. 2010)  
17 Garrett v. Coast & Southern Sav. & Loan Ass'n (1973) 9 Cal.3d 731  
18 General Electric Capital Corp. v. Future Media Productions, Inc., 536 F.3d 969 (9<sup>th</sup> Cir.  
19 2008)  
20 Harbor Island Holdings v. Kim, 107 Cal.App.4th 790 (Cal.App.4th Dist. 2003)  
21 Harper v. Ultimo, 113 Cal. App. 4th 1402 (Cal. App. 4th Dist. 2003)  
22 Howard J. White, Inc. v. Varian Associates, 178 Cal.App. 2d 348 (Cal. App. 1st Dist. 1960)  
23 In re Charles St. African Methodist Episcopal Church of Boston ("CSAME"), 2012 Bankr.  
24 LEXIS 4321 (Bankr. D. Mass. Sept. 18, 2012)  
25 In re Clifondale Oaks, LLC, 357 B.R. 883, 887 (Bankr. N.D. Ga. 2006)  
26 In re Consolidated Properties Ltd. Partnership, 152 B.R. 452 (Bankr. D. Md.1993)  
27 In re Harvest Oaks Drive Assocs., LLC, 2011 Bankr. LEXIS 146 (Bankr. E.D.N.C. Jan. 14,  
28 2011)

1 In re Hoopai, 581 F.3d 1090 (9th Cir. 2009)  
2 In re Kalian, 178 B.R. 308, 312 n. 9 (Bankr. D.R.I. 1995)  
3 In re Market Center East Retail Property, Inc., 433 B.R. 335 (Bankr. D.N.M. 2010)  
4 In re Sweet, 369 B.R. 644 (Bankr. D. Colo. 2007)  
5 In re VEC Farms, LLC, 395 B.R. 674 (Bankr. N.D. Cal. 2008)  
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8 In re Zamani, 390 B.R. 680, 2008 Bankr. LEXIS 1923  
9 Knarston v. Manhattan Life Ins. Co. (1903) 140 Cal. 57  
10 Lona v. Citibank, N.A., 202 Cal. App. 4th 89 (Cal. App. 6th Dist. 2011)  
11 Mitsui Mfrs. Bank v. Superior Court, 212 Cal. App. 3d 726 (Cal. App. 4th Dist. 1989)  
12 New Hampshire v. Maine, 532 U.S. 742 (2001)  
13 Ridgley v. Topa Thrift & Loan Ass'n, 17 Cal.4th 970 (Cal. 1998)  
14 Rubin v. L.A. Fe. Sav. & Loan Ass'n (1984) 159 Cal.App.3d 292  
15 Sutherland v. Barclays American/Mortgage Corp., 53 Cal. App. 4th 299 (Cal. App. 2d Dist.  
16 1997)  
17 United States v. Ibrahim, 522 F.3d 1003 (9th Cir.2008)  
18 Varela v. Wells Fargo Bank, 15 Cal. App. 3d 741 (Cal. App. 3d Dist.1971)  
19 Whaley v. Belleque, 520 F.3d 997 (9th Cir.2008)

20 **STATUTES AND RULES**

21 California Civil Code Section 1671  
22 Restat 2d of Contracts, § 90, 208  
23 Restat 2d of Contracts, § 208  
24 11 USC §362  
25 11 USC §506  
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27  
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1 **I. Introduction and Summary of Objection.**

2 Debtor objects to the BPB Claim because after 2 1/4 years of negotiations with Debtor,  
3 agreements with Debtor, representations to Debtor, court filings in state court, court filings in  
4 this Bankruptcy Case, payments from Debtor of approximately \$912,680.90, and notice of a  
5 sale of Debtor's real property BPB suddenly attempted to backdate Debtor's 2 1/4 years of  
6 payments, assert an additional \$214,151.35 in principal, belatedly assert default interest and  
7 late fees, and bonus itself an additional \$465,643.30 (the difference between the figure stated  
8 in the BPB Claim and the \$3,341,017.00 paid to BPB on November 8, 2013 following the sale  
9 of Debtor's real property) and then add attorney's fees to that bonus, many of which does not  
10 relate to its note and deed of trust and were not reasonable or necessary. Debtor asserts, inter  
11 alia and as set forth hereinafter, that Debtor cured the note in July 2011 pursuant to Debtor's  
12 agreement with BPB and Debtor kept the loan current by paying BPB its regular monthly  
13 payment pursuant to its agreement with BPB, BPB does not have any right to backdate  
14 Debtor's 2 1/4 years of payments or charge late fees and default interest, and any alleged  
15 right to backdate Debtor's payments and charge default interest and late fees was waived, is  
16 unenforceable, is barred by equitable estoppel, the equities of the case, and judicial estoppel.

17 **II. Case Background/Status.**

18 The following case background and status are presented in summary form to assist to  
19 the court with the Objection and Debtor submits that the factual background stated herein is  
20 substantively and substantially undisputed, subject to judicial notice, and supported by the only  
21 person with person knowledge, namely Debtor's Responsible Individual Andrew A. Lewis.

22 **A. May 2009 Loan to Kimomex.**

23 In May 2009, several investors (collectively the "Investors") loaned \$635,000 to  
24 Kimomex Santa Clara, LLC ("Kimomex") secured by a deed of trust in second position  
25 ("Second DOT") to Investment Grade Loans, Inc. ("IGL") as trustee against the Property.  
26 The Second DOT was subject to an existing first deed of trust in the amount of  
27 approximately \$3.6 million dollars recorded in July 2008 in favor of Boston Private Bank &  
28 Trust Company ("BPB") (formerly known as Borel Private Bank & Trust Company) (the

1 “First DOT”). The Property consisted of 1.4 acres improved with a commercial building of  
2 approximately 26,575 square feet originally built in 1966 which was occupied by tenant  
3 Kimomex Markets, Inc. which operated a Mexican grocery store business.

4 **B. July 2011 Foreclosure Agreement.**

5 The Mexican grocery store business failed and Kimomex entered into protracted  
6 negotiations with a potential new grocery store tenant, i.e. Fresh & Easy, but that deal was  
7 never consummated. In March 2011 BPB recorded a notice of default under the First DOT  
8 and eventually set a trustee’s sale for July 20, 2011.

9 On July 15, 2011, prior to the sale date, BPB and IGL entered into an “Agreement Re  
10 Foreclosure Sale” (the “Foreclosure Agreement”). Under the Foreclosure Agreement BPB  
11 agreed that if IGL immediately paid \$380,661.90 to cure the arrearage BPB would postpone  
12 the trustee’s sale to after August 17, 2011, and that if IGL made “the regular monthly  
13 payment of \$24,307.45 due under the Loan” to keep the loan current, then BPB would  
14 continuously postpone the trustee’s sale through March 16, 2012. The Foreclosure  
15 Agreement also provided that the \$380,661.90 sum shall be applied to payments of principal  
16 and interest now due, together with certain trustee’s fees, attorneys’ fees and other costs  
17 owing to Borel as of the date of this Agreement . . .” On July 18, 2001, pursuant to the  
18 Foreclosure Agreement, IGL paid BPB \$380,661.90 to reinstate and bring the loan current.  
19 The Foreclosure Agreement acknowledges the Second DOT and at all times related to the  
20 Foreclosure Agreement and thereafter BPB was aware of the Second DOT.

21 On June 30, 2011, prior to the Foreclosure Agreement, BPB’s agent PLM Lender  
22 Services, Inc. (“PLM”) provided IGL with a reinstatement letter dated June 29, 2011 which  
23 indicated, in part, the amounts necessary to reinstate the loan through July 15, 2011 and  
24 specified a principal balance of \$3,487,501.16. Exhibit A to Declaration of Andrew A.  
25 Lewis). Debtor negotiated the reinstatement and cure amount of \$380,661.90 directly with  
26 Bruce Brown of BPB and based those negotiations and many factors, including the asserted  
27 principal balance of \$3,487,501.16, that the regular monthly was \$24,307.45, that the regular  
28

1 monthly payment consisted of principal and interest at 6.5%, that the regular monthly  
2 payment of \$24,307.45 would keep the loan current, and without knowledge of any  
3 environmental issues with the Property. IGL would not have foreclosed on its Second DOT,  
4 entered into the Foreclosure Agreement on behalf of IGL, paid the agreed reinstatement and  
5 cure monies of \$380,661.90 or paid the regular monthly payments of \$24,307.45 to keep the  
6 loan current had the principal balance not been \$3,487,501.16, had the payment of  
7 \$380,661.90 and the regular monthly payment of \$24,307.45 not reinstated, cured, and kept  
8 the loan current, had the regular monthly payments of \$24,307.45 not been based on interest  
9 at 6.5% and been applied to both principal and interest, had I been advised by BPB of the  
10 environmental issues with the Property, and had I been advised by BPB that it may attempt to  
11 assert any right to thereafter backdate and/or re-apply the monies already paid to it against  
12 alleged late fees, interest at 8.5%, or other costs.

13 **C. October 2011 Foreclosure And Second DOT On Empty Building.**

14 In June 2011 IGL recorded a notice of default under the Second DOT. The foreclosure  
15 took place on October 24, 2011. At the time of the sale, the unpaid balance was  
16 \$1,183,908.74. At the sale, the Investors bid \$100,000, which was the highest bid, and  
17 became the owners of the Property, leaving a deficiency balance due on the second loan of  
18 \$1,083,908.74. At the time of the foreclosure, the building was empty, there was no tenant,  
19 and there was no rental income. BPB was promptly made aware of the foreclosure on the  
20 Second DOT.

21 Between October 2011 and March 2012, the Investors marketed the Property for lease  
22 to potential tenants, found a tenant in March 2012, and eventually paid \$242,000 in leasing  
23 commissions. At the same time IGL was paying BPB its regularly monthly payment of  
24 \$24,307.45 per month to keep the loan current.  
25

26 **D. First and Second Amendments to Foreclosure Agreement.**

27 In November 2011 and January 2012, IGL and BPB entered into a "First Amendment"  
28



1 and a “Second Amendment to Agreement Re Foreclosure Sale” (the “Second Amendment”).  
2 Under the Second Amendment the parties agreed that if IGL made “the regular monthly  
3 payments” for December 2011 through March 2012 of \$24,307.45 to keep the loan current  
4 then BPB would postpone the foreclosure sale, and if the Investors wanted to pay off the  
5 First DOT, BPB would accept \$3.25 million dollars, less the payments made for those  
6 months, in full satisfaction of the First DOT. The plan was to have the Property leased and  
7 sold by March 2012 in order to pay off the First DOT. I negotiated these amendments directly  
8 with Bruce Brown of BPB.

9 **E. March 2012-New Tenant and Third Amendment.**

10 In March 2012, the Investors formed 272 E Santa Clara Grocery, LLC (“Debtor”) and  
11 deeded their respective ownership interests in the Property to the Debtor. The deed was  
12 recorded in April 2012. BPB was promptly made aware of the transfer of such interest to the  
13 Debtor (and such is reflected in the Fourth Amendment discussed hereinafter).

14 On or about March 8, 2012, Debtor, as landlord, entered into a 10-year lease for the  
15 Property with Grocery Outlet, Inc., a national grocery store chain. During the first few years  
16 the tenant pays rent of \$39,600 per month. The monthly rent was net of all expenses,  
17 including property taxes, insurance, and maintenance (except the roof and structure) which  
18 are all paid by the tenant.  
19

20 In March 2012, BPB, IGL, and Debtor entered into a “Third Amendment to Agreement  
21 Re Foreclosure Sale” (the “Third Amendment”). Under the Third Amendment, the parties  
22 agreed that if BPB was paid “the regular monthly payment of \$24,307.45 due under the  
23 Loan” to keep the loan current then BPB would postpone the trustee’s sale through  
24 December 31, 2012. The parties further agreed that Plaintiff and Debtor would enter into a  
25 Subordination, Non-Disturbance and Attornment Agreement (“SNDA”) under which BPB  
26 would not disturb the tenant’s possession in the event BPB foreclosed, which SNDA was  
27 signed on July 26, 2012. The Third Amendment was negotiated with Bruce Brown on behalf  
28 of BPB.

1 In reliance upon the multiple agreements with BPB, Debtor continued to pay BPB  
2 \$24,307.45 per month through and including March 2013 to keep the loan current. Thus,  
3 from July 2011 through March 2013, Debtor paid Plaintiff \$380,661.90 to cure the arrearage  
4 and bring the loan current, plus approximately \$413,219 in monthly payments for a total of  
5 \$793,880.90 to keep the loan current. This is in addition to the approximate \$242,000 for  
6 leasing commissions spent to find a tenant. Thus, a total of approximately \$1,033,880 was  
7 spent in reliance upon the agreements with BPB.

8 The Third Amendment indicated a principal balance on the loan of \$3,460,917.00.

9 IGL and Debtor would not have foreclosed on its Second DOT, entered into the  
10 Foreclosure Agreement or subsequent amendments, paid the agreed reinstatement and cure  
11 monies of \$380,661.90 to bring the loan current, or paid the regular monthly payments of  
12 \$24,307.45 to keep the loan current had the principal balance not been \$3,487,501.16, had  
13 the payment of \$380,661.90 and the regular monthly payment of \$24,307.45 not cured,  
14 reinstated, and kept the loan current, had the regular monthly payments of \$24,307.45 not  
15 been based on interest at 6.5% and been applied to both principal and interest, had I been  
16 advised by BPB of the environmental issues with the Property, and had I been advised by  
17 BPB that it may attempt to assert any right to thereafter backdate and/or re-apply the monies  
18 already paid to it against alleged late fees, interest at 8.5%, or other costs.

19  
20 **F. December 2012-Sale of Property and Debtor's Discovery of Environmental**  
21 **Contamination and BPB's Non-Disclosure.**

22 In November 2012, Debtor found a buyer and entered into a contract for the sale of the  
23 Property for \$7.3 million dollars. The escrow was scheduled to close in December 2012. This  
24 sale would have paid off BPB's lien. However, during their due diligence, the buyer  
25 discovered that the Property was listed with the State and/or County as undergoing clean-up  
26 or investigation due to a possible leak from an old underground storage tank. Specifically,  
27 while conducting a Phase I, Environmental Investigation, the buyer discovered the existence  
28 of prior reports filed showing that the Property was contaminated. As a result of the

1 discovery, the buyer cancelled the sale.

2 This discovery by the buyer was the first notice that Debtor had of any contamination on  
3 the Property. However, Debtor was informed that BPB had been aware of the contamination  
4 since 2008, had a copy of a report showing purported contamination, and never disclosed the  
5 report or the purported contamination to Debtor. Had BPB disclosed this information to  
6 Debtor, Debtor would not have paid BPB \$793,880 to cure the default, made the regular  
7 monthly payments under the First DOT to keep the loan current, or invested another  
8 \$242,000 in leasing commissions to find a tenant. In addition, had BPB disclosed this  
9 information, not affirmatively acknowledged the declining principal (\$3,460,917.00 in the  
10 Third Agreement), not reinstated or treated the loan as current, not based the regular monthly  
11 payment of \$24,307.45 on 6.5% and applied such payments to interest and principal, or  
12 asserted any right to thereafter backdate and/or re-apply the monies already paid to it against  
13 alleged late fees, interest at 8.5%, or other costs then IGL and Debtor would not have  
14 entered into the Foreclosure Agreement or taken any of the actions described herein.

15 **G. May 2013-Proposed Fourth Amendment, Agreement to Suspend Payments, and**  
16 **Release of Claims.**

17 Debtor continued to make the regular monthly payments of \$24,307.45 to BPB through  
18 March 2013 to keep the loan current. Around that time, BPB, IGL and Debtor negotiated the  
19 terms for a fourth amendment regarding the foreclosure sale. Under the terms as negotiated,  
20 Plaintiff agreed that so long as Debtor and IGL took certain steps to obtain a “closure and/or  
21 no further action letter” regarding the contamination from the required regulatory agency,  
22 and to the extent required, pay for any additional environmental investigation, testing,  
23 remediation and/or other work, kept BPB apprised of the progress, and obtained a “closure  
24 and/or no further action letter” resolving all environmental issues no later than April 30,  
25 2014, then no monthly payments after March 2013 would be due, and the foreclosure sale  
26 would be continued through April 30, 2014. Debtor negotiated this amendment directly with  
27 Bruce Brown of BPB.

1 In reliance upon the agreement that no payments were due after March 2013, Debtor did  
2 not make payments pending the drafting and execution of the fourth amendment. The draft  
3 fourth amendment was not received until May 2013. Consistent with the negotiations, the  
4 draft fourth amendment stated that no payments would be due after March 2013. However,  
5 contrary to prior discussions, the proposed "Fourth Amendment to Agreement Re  
6 Foreclosure Sale" (the "Fourth Amendment"), required Debtor, IGL, and their predecessors  
7 to release BPB from any claims relating to the Property including any environmental issues.  
8 As BPB had failed to disclose the environmental contamination to Debtor prior to and during  
9 its dealings and did not know the severity of the contamination and cost of remediation,  
10 Debtor refused to execute the Fourth Amendment. The Fourth Amendment, prepared by BPB  
11 and presented to Debtor for signature, indicated a principal balance on the loan of  
12 \$3,341,017.00.

13 In late January or early February 2013 Debtor contacted BPB because Debtor needed  
14 payment information for its tax returns and had not received a 1098 or similar form from  
15 BPB. On February 4, 2013 Debtor received a facsimile from BPB consisting of a payment  
16 history on the loan. The payment history reflects a payment history for 12/27/11 through  
17 12/31/12, a principal balance of \$3,460,916.67, regular monthly payments of \$24,307.45, but  
18 an allocation of the payment only to interest and at 8%. (A true and correct copy of this fax is  
19 attached to the Declaration of Andrew A. Lewis as Exhibit B). Therefore, Debtor contacted  
20 Bruce Brown of BPB, indicated that the payment history was incorrect in terms of the interest  
21 rate and application of the regular monthly payment to interest and principal, and asked that  
22 the errors be corrected immediately and made consistent with our agreement that the loan  
23 was brought current and kept current by the prior payments so Debtor could prepare its tax  
24 returns. BPB agreed to correct the errors.

25 On February 25, 2013 Bruce Brown of BPB emailed an adjusted amortization schedule  
26 which referenced the loan, the payment history from July 19, 2011 through February 15,  
27 2013, the interest rate at 6.5%, the regular monthly payment of \$24,307.45, the application of  
28

1 the regular monthly payment to principal and interest at 6.5%, a declining principal balance,  
2 and a principal balance of \$3,347,194.03. (A true and correct copy of this Amortization  
3 Schedule is attached to the Declaration of Andrew A. Lewis as Exhibit C). Debtor secured  
4 this amortization schedule from BPB for its 2012 taxes, reasonably relied upon this  
5 information, and used this information for its 2012 tax returns.

6 **H. May 13, 2013-BPB Serves Demand on Tenant to Pay All Rents to BPB.**

7 On or about May 17, 2013 BPB served a “Demand That You Pay Rent To A Party  
8 Other Than The Landlord” on the tenant. Debtor received confirmation that the tenant would  
9 comply with the demand and pay all rents directly to BPB. In compliance with the demand  
10 and commencing June 2013, BPB received and continues to receive all the rent, i.e. \$39,600,  
11 directly from the tenant (this rent was about \$15,300 more than the regular monthly  
12 payment). Pre-petition Debtor tendered, and continued to tender, immediate payment of the  
13 total arrearage, thereby bringing and maintaining the loan current. BPB wrongfully rejected  
14 this tender.

15 **I. State Court Action.**

16 On June 10, 2013, BPB filed a Verified Complaint For (1) Judicial Foreclosure; And (2)  
17 Specific Performance And Appointment of Receiver commencing a state court action against  
18 Kimomex and Debtor, Santa Clara County Superior Action No.: 1-13-CV-247961 (“State  
19 Court Action”) and wherein BPB, under penalty of perjury, repeatedly asserted “As of June  
20 10, 2013, there is due, owing and outstanding under the Promissory Note the principal  
21 amount of \$3,341,017.20 . . .”. Although the State Court Action does not acknowledge the  
22 prior agreements and prior payments, it does not assert or quantify any claim for default  
23 interest. This principal figure appeared consistent with the information provided to us by  
24 BPB and the agreements with BPB and Debtor reasonably relied upon this information.  
25

26 **J. Bankruptcy.**

27 On June 27, 2013, Debtor commenced this Chapter 11 bankruptcy case (“Bankruptcy  
28

1 Case”). No Receiver or Trustee has been appointed, and the Debtor remains a Debtor in  
2 Possession under Chapter 11 of title 11, United States Code sections 1107 and 1108. The  
3 bankruptcy was filed to avoid the unnecessary and expensive appointment of a receiver, to  
4 prevent BPB’s pending foreclosure, and protect Debtor’s substantial investment and  
5 substantial equity.

6 On October 7, 2013, the court issued an Order Denying Motion for Order Confirming  
7 No Stay with Respect to Rent and Denying Cross-Motion for Use of Cash Collateral  
8 (Doc#64). On October 7, 2013, this court issued an Order Denying Motion for Order  
9 Confirming No Stay with Respect to Rent and Denying Cross-Motion for Use of Cash  
10 Collateral (“Order”)(Doc#64) which, in summary confirmed Debtor’s position that the post-  
11 petition rental income was property of the estate pursuant to Bankruptcy Code 541 and cash  
12 collateral of BPB and may not be used by Debtor absent consent of BPB or order of the  
13 court.

14 Debtor attempted to secure an agreement with BPB regarding the use of cash collateral,  
15 prior to and after this court’s Order, but BPB refused to consent<sup>3</sup> to Debtor using such funds  
16 to pay BPB its contractual interest payment of \$24,307.45 for the post-petition months of  
17 July-October and thereafter as monthly rental income of \$39,600 is received from Debtor’s  
18 tenant, to pay United States Trustee Quarterly Fees as invoiced by the United States Trustee  
19 (“UST”), and to hold the balance of such funds in Debtor’s DIP account pending an  
20 agreement with BPB and/or an order from this court and without prejudice to the rights of  
21 BPB or Debtor. Debtor’s Motion to Use Cash Collateral Filed by Debtor 272 E Santa Clara  
22 Grocery, LLC (Doc#80) was amended following Debtor’s sale of real property.

23 **K. Status of Environmental Issue.**

24 Debtor contracted with ERAS Environmental, Inc. (“ERAS”) to assist Debtor address  
25 the environmental issues and secure government clearance so the Property can be sold. On  
26 August 26, 2013 the Santa Clara County Department of Environmental Health (“DEH”)

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27  
28 <sup>3</sup>BPB orally refused to consent to the use of such funds and then refused to consent to us of such funds in writing (twice).

1 advised Debtor that based on their review it appeared that the Property qualified for closure  
2 under State Water Resource Control Board Low-Threat Underground Storage Tank Case  
3 Closure Policy ("LTCP"), no further action was required at that time, and the matter would  
4 proceed through the closure process which it continues to do.

5 **III. Debtor Objects To the BPB Claim on Several Factual and Legal Grounds.**

6 **A. BPB'S Principal Claim Is Overstated and Contradicts Previous Sworn**  
7 **Statements Relative to the Outstanding Principal Due.**

8  
9 Debtor objects to BPB's principal claim because it is improperly overstates and  
10 contradicts the repeated, sworn and represented amount of outstanding principal by at least  
11 \$214,151.50.

12 On June 10, 2013, BPB filed a Verified Complaint For (1) Judicial Foreclosure; And (2)  
13 Specific Performance And Appointment of Receiver commencing a state court action against  
14 Kimomex and Debtor, Santa Clara County Superior Action No.: 1-13-CV-247961 ("State  
15 Court Action") and wherein BPB, under penalty of perjury, asserted "As of June 10, 2013,  
16 there is due, owing and outstanding under the Promissory Note the principal amount of  
17 \$3,341,017.20 . . ." <sup>4</sup>

18 On July 12, 2013, BPB, through David Scheiber, Senior Vice President- Special Assets  
19 Department of BPB, filed a declaration, under penalty of perjury, and asserted that the  
20 outstanding balance due and owing by Debtor to BPB on the First DOT as of June 27, 2013  
21 totaled \$3,341,017.20. Specifically, BPB asserted "As of June 27, 2013, the outstanding  
22 principal balance due and owing from Kimomex under the Promissory Note and other Loan  
23 Documents is \$3,341,017.20 . . ." ("Scheiber Declaration")(Doc#22-2<sup>5</sup>, entered July 12,  
24 2013, page 3, paragraph 7)

25 \_\_\_\_\_  
26 <sup>4</sup>The State Court Action was filed by BPB's current counsel and verified by David Scheiber and  
is subject to judicial notice pursuant to Federal Rules of Evidence 201.

27 <sup>5</sup>The court may take judicial notice of its own files pursuant to Federal Rules of Evidence 201  
28 and such files are referred to herein as "Doc", meaning Docket, and corresponding Docket  
number



1 On July 30, 2013 BPB filed a Reply in Support of its Ex Parte Applications for Orders  
2 of Examination and for Production of Documents Pursuant to Bankruptcy Rule 2004, in  
3 support of numerous 2004 applications (Doc#31-36 and 41) asserting "BPB holds the senior  
4 lien on the Property securing a loan with an outstanding principal balance of \$3,341,017.20".  
5 (Doc#42, entered July 30, 2013, page 3, lines 7-8) At the same time BPB also re-filed the  
6 Scheiber Declaration to support the alleged principal balance of \$3,341,017.20. (Doc#31-3,  
7 entered July 30, 2013, page 3, paragraph 7)

8 On August 12, 2013 BPB filed an additional 2004 application and asserted "BPB holds  
9 the senior lien on the Property securing a loan with an outstanding principal balance of  
10 \$3,341,017.20. (Counsel Decl. Exh. 1 ("Scheiber Declaration"), at ¶7.)" (Doc#45, page 2,  
11 paragraph 3)

12 On August 14, 2013 BPB filed Secured Creditor Boston Private Bank & Trust  
13 Company's Opposition to Debtor's Cross Motion for Use of Cash Collateral and asserted  
14 "As of the Petition Date, the outstanding principal balance due and owing from Kimomex to  
15 BPB under the Note and other Loan Documents was \$3,341,017.20 . . ." (Doc#50, page 4,  
16 lines 6-9).

17 On October 15, 2013 BPB filed a Declaration of Counsel In Support of Opposition to  
18 Ex Parte Application For Order Directing Boston Private Bank & Trust Company's  
19 Production of Documents Under Bankruptcy Rule 2004 and asserted "BPB holds the senior  
20 lien on the certain leased real property located at 272 E. Santa Clara Street, San Jose, Ca. (the  
21 "Property") securing a loan with an outstanding principal balance of \$3,341,017.20".  
22 (Doc#51, page 5, lines 3-5)

23 Similarly, BPB consistently provided Debtor with confirmation of the principal  
24 amount owed under the loan and First DOT upon which Debtor relied. Debtor would not  
25 have pursued foreclosure of its Second DOT, the various agreements with BPB, secured a  
26 tenant, or paid BPB and various related expenses totaling approximately \$1,033,880  
27 (\$380,661.90 to BPB to cure and reinstate the loan, \$242,000 in leasing commissions, and  
28 \$413,219 to BPB (\$24,307.45 from July 2011-March 2013) for regular monthly payments of



1 principal and interest to keep the loan current if the principal was not as represented by BPB.  
2 Debtor rightfully relied upon BPB's representations of principal as reflected in its June 2011  
3 reinstatement letter (principal \$3,487,501.16), in the March 2012 BPB Third Amendment  
4 (principal \$3,460,917.00), its February 2013 Amortization Schedule (principal  
5 \$3,347,194.03), and in the March 2013 Fourth Amendment (principal \$3,341,017.00).

6 Yet, just as Debtor moved to sell the Property BPB filed the BPB Claim and asserted,  
7 contrary to all prior declarations and documents, that "As of the petition date, the outstanding  
8 principal due and owing from Kimomex under the Promissory Note and other Loan  
9 Documents is \$3,555,168.55. (Proof of Claim No. 2, page 5) Suddenly, as Debtor moves to  
10 sell the Property, a \$214,151.35 (\$3,555,168.55-\$3,341,017.00) difference in the claimed  
11 principal arises and said difference is reflected between BPB's agreements with Debtor, the  
12 Verified Complaint in the State Court Action, and repeatedly filed declarations and  
13 representations made in this bankruptcy case on the one hand and the BPB Claim on the  
14 other hand.

15 Debtor objects to the BPB Claim as it includes an incorrect and backdated principal  
16 figure.

17 **B. BPB's Purported Calculation of Interest Is Also Overstated Because Its**  
18 **Principal Claim Is Overstated, It Contradicts Previous Sworn Statements**  
19 **Relative to the Outstanding Principal Due, It Is Miscalculated, and It Neglects**  
20 **to Account for Debtor's November 8, 2013 Payment.**

21 Debtor objects to the BPB Claim, in addition to the reasoning discussed hereinafter,  
22 because the principal claim is overstated and contradicts the repeated, sworn and represented  
23 amount of outstanding principal by at least \$214,151.50 and thus results in an overstatement  
24 of any calculation of interest, whether it be contract interest at 6.5% or alleged default  
25 interest at 8.5%, relative to the overstated principal. The BPB Claim asserts two different  
26 interest totals, \$217,401.61 as of October 15, 2013 and \$242,584.05 as of November 15, 2013 a  
27 difference of \$25,182.44. As discussed hereinabove and hereinafter said figures are both  
28 miscalculated.

1 On November 8, 2013 Debtor, pursuant to the court's October 30, 2013 Order  
2 Granting Motion to Sell Real Property (272 E. Santa Clara St.) Free and Clear of Liens and  
3 Pay Broker/agent (Docket#89), paid BPB \$3,341,017.20 in principal. BPB has not amended  
4 the BPB Claim or acknowledged such principal payment.

5 **C. BPB's Entire Claim Was Admittedly Backdated.**

6 Debtor objects to the BPB Claim because it was, admittedly, backdated. Debtor rejects  
7 the explanation for the backdating as "based on a proper allocation of prior payments" as  
8 alleged therein. Debtor also rejects BPB's alleged explanation that prior to preparation of its  
9 claim it had not formally calculated the outstanding balance as alleged therein as such is,  
10 highly implausible, and contrary to every written representation BPB provided to Debtor.  
11 Debtor submits that BPB, in an effort to improperly maximize its recovery, admitted  
12 backdated its calculations.

13 **D. BPB Has Improperly Asserted Default Interest Against the Debtor and**  
14 **Improperly Backdated the Alleged Default Date.**

15 Debtor objects to the BPB Claim on the grounds it improperly asserts default interest  
16 at 8.5% interest against Debtor and improperly backdates such default interest to May 5,  
17 2009. A creditor must take affirmative action to put the debtor on notice that it intends to  
18 exercise its option to accelerate and in turn charge the default interest rate. Beal Bank v.  
19 Crystal Props., LTD. (In re Crystal Props., LTD.), 268 F.3d 743, 747-748 (9th Cir. Cal.  
20 2001); see also In re Zamani, 390 B.R. 680, 2008 Bankr. LEXIS 1923, 60 Collier Bankr.117  
21 (Bankr. N.D. Cal. 2008). BPB failed to put Debtor on notice of its intention to accelerate the  
22 note and seek default interest. In fact, BPB did the opposite.

23 BPB was aware of Debtor's junior deed of trust on the Property and did not assert any  
24 objection relative thereto, negotiated and entered into various agreements with Debtor  
25 wherein BPB specified the amounts necessary to cure arrears and Debtor needed to pay and  
26 accepted these payments from Debtor over the course of approximately 2 1/4 years to keep  
27 the loan current without objection, was aware of Debtor's foreclosure on its junior deed of  
28

1 trust on the Property and did not assert any objection relative thereto, was aware of Debtor's  
2 efforts to ready the Property to secure a tenant and that it had secured a tenant and did not  
3 assert any objections relative thereto, was aware of Debtor's efforts to market and sell the  
4 Property and of its December 2012 sale and did not assert any objection relative thereto,  
5 continued to accept regular monthly payments from Debtor without objection or reservation,  
6 and at no time prior to the commencement of this case did BPB ever claim default interest.

7  
8 In reliance thereon, Debtor foreclosed on its junior deed of trust, paid substantial  
9 monies to BPB to cure its arrears, paid substantial monies to BPB to maintain its regular  
10 monthly contract payment to keep the loan current, paid substantial monies to others to ready  
11 the Property for a tenant and to secure a tenant, and marketed the Property for sale and  
12 secured a buyer-only to have the sale fall through due to BPB's non-disclosure of the  
13 environmental issue. Similarly, BPB consistently provided Debtor with confirmation of the  
14 principal amount owed under the loan and First DOT upon which Debtor relied. Debtor  
15 would not have pursued foreclosure of its Second DOT, the various agreements with BPB,  
16 secured a tenant, or paid BPB and various related expenses totaling approximately  
17 \$1,033,880 (\$380,661.90 to BPB to bring the loan current and reinstate the loan, \$242,000 in  
18 leasing commissions, and \$413,219 to BPB (\$24,307.45 from July 2011-March 2013) for  
19 regular monthly payments of principal and interest to keep the loan current if the principal  
20 was not as represented by BPB. Debtor rightfully relied upon BPB's representations of  
21 principal as reflected in its June 2011 reinstatement letter (principal \$3,487,501.16), in the  
22 March 2012 BPB Third Amendment (principal \$3,460,917.00), its February 2013  
23 Amortization Schedule (principal \$3,347,194.03), and in the March 2013 Fourth Amendment  
24 (principal \$3,341,017.00).

25 The Promissory Note between BPB and Kimomex provides the borrower with a right to  
26 cure and provides that various defaults are curable. Debtor submits that Debtor cured all  
27 curable defaults or such were waived by BPB.

28 **E. The BPB Claim Improperly Includes Late Fees Notwithstanding Debtor**

1                   **Cured BPB's Claimed Monetary Defaults and Caused Timely Monthly**  
2                   **Payments to Be Made Thereafter and Through Present.**

3           The BPB Claim improperly asserts late fees notwithstanding Debtor cured BPB's  
4 claimed monetary defaults and bring the loan current in approximately July 2011 and caused  
5 timely, regular monthly payments to be made thereafter to keep the loan current, including  
6 those payments intercepted by BPB from Debtor's tenant and/or that which BPB refused to  
7 accept.

8           The BPB Claim asserts late fees of \$1,215.37 a month from July 19, 2011 to October  
9 15, 2013 and totaling \$34,030.36 as of November 15, 2013. Yet, the same BPB Claim  
10 simultaneously asserts payments made from July 19, 2011 through March 15, 2013, fails to  
11 acknowledge a May 2013 agreement between BPB and Debtor that monthly payments need  
12 not be made, fails to acknowledge that pre-petition BPB received the June 2013 rent payment  
13 of \$39,600 following BPB's May 17, 2013 BPB Demand That You Pay Rent To A Party  
14 Other Than The Landlord, and fails to acknowledge that post-petition BPB intercepted  
15 \$39,600 for four consecutive months (July-October 2013) totaling \$158,400 (\$39,600 x 4)  
16 and then refused to accept payments of \$24,307.45 from Debtor for the months of July-  
17 October 2013 and thereafter as Debtor's tenant paid its monthly rent. Debtor filed a Motion  
18 for Use of Cash Collateral because BPB refused to accept such payments.

19           BPB has no basis to charge Debtor late fees. As stated hereinabove, Debtor has made  
20 all payments as agreed, BPB received overpayments from Debtor's tenant or simply refused  
21 to accept payments, and Debtor only stopped making payments pursuant to a verbal  
22 agreement with BPB that no payments needed to be made until the environmental issue  
23 relative to the Property could be resolved (as referenced in the Fourth Amendment Re  
24 Foreclosure Sale) and then BPB intercepted, kept, and should have applied the April, May,  
25 and June 2013 \$39,600 each (\$118,800) and then wrongfully intercepted, held without  
26 applying payments against the loan, belatedly turned over to Debtor rents for July-October  
27 2013, but then refused to accept payments for July-October and thereafter from Debtor at  
28

1 \$24,307.45 per month.

2 **F. BPB Is Not Entitled to Attorney's Fees or Costs From Debtor Because They**  
3 **Are Not Included in The BPB Claim, Debtor Is Not BPB's Borrower, Debtor Has**  
4 **Been the Prevailing Party on All Actions Asserted by BPB, and BPB's**  
5 **Attorney's Fees Were Not Reasonable or Necessary.**

6 Debtor objects to the BPB Claim on the grounds it simply asserts that BPB is entitled to  
7 attorney's fees and costs, but omits any basis, figures, supporting documents, or supporting  
8 evidence. Similarly, to the extent BPB has an attorney's fee claim such rest against its  
9 borrower Kimomex, and any guarantors of such loan and not Debtor. Although the BPB  
10 Claim omits any basis, figures, supporting documents, or supporting evidence for a claim for  
11 attorney's fees and for asserting such claim against the Debtor, Debtor objects to the  
12 anticipated claim on the grounds that Debtor prevailed on all actions asserted by BPB and  
13 BPB's attorney's fees were not reasonable or necessary. Some non-exclusive examples are  
14 worth noting.

15 As of the date of this Objection BPB has objected to Debtor's employment of Debtor's  
16 counsel and employment of Debtor's Special Counsel, only to cause Debtor unnecessary  
17 expense and thereafter withdraw those objections<sup>5</sup>. BPB filed multiple applications for 2004  
18 examinations to examine Debtor's members without ever applying to examine Debtor; filed  
19 multiple applications for 2004 examinations to examine Debtor's members regarding  
20 potential preference claims to which it did not have a security interest and knew were invalid  
21 due to Debtor's solvency; filed an application for examination of Debtor's environmental  
22 consultant ERAS Environmental, Inc. and then never submitted the order and  
23 notwithstanding BPB's knowledge that ERAS Environmental, Inc's report would be a matter  
24 of public records once filed with the County of Santa Clara and it would be filed upon  
25 payment of the outstanding balance of \$6,359.10-which Debtor's creditor advanced due to

26 \_\_\_\_\_  
27 <sup>5</sup>Debtor submits that BPB, which does not have any direct interest in Debtor's claim against the  
28 guarantors of Debtor's loan objected to Debtor's employment of Special Counsel because BPB  
has a judgment against the same parties based on an obligations unrelated to the Property and  
wanted to deter Debtor's collection efforts.

1 BPB's delays in agreeing to pay such balance from cash collateral and/or rent and which  
2 substantially delayed Debtor's receipt of a No Further Action letter from the County of Santa  
3 Clara; and then proceeded with one examination of member and creditor Andrew A. Lewis  
4 for ½ day via video tape (the examination was not officially concluded and the underlying  
5 application did not relate to Mr. Lewis's capacity as Debtor's manager or Responsible  
6 Individual.

7  
8 BPB then filed a motion to determine that the bankruptcy's automatic stay did not apply  
9 to post-petition rents notwithstanding authority to the contrary, delayed turning over such  
10 property of the estate upon receipt of the court's October 7, 2013 order finding such post-  
11 petition rents as property of the estate, and then refused to consent to any use of such cash  
12 collateral, including to pay BPB.

13 Debtor objects to the BPB Claims on the grounds that the BPB Claim simply asserts that  
14 it is entitled to attorney's fees and costs, but omits any basis, figures, supporting documents,  
15 or supporting evidence; its true claim is against its borrower Kimomex and any guarantors of  
16 such loan and not Debtor; and such attorney's fees and costs were not reasonable or  
17 unnecessary<sup>6</sup>.

18 **G. Debtor Has Multiple Claims Against the BPB Claim.**

19 Debtor submits that it has multiple claims against BPB. Some non-exclusive examples  
20 are worth noting.

21 **1) BPB Willfully Violated the Automatic Stay and Caused Debtor Damages**  
22 **Yet to Be Quantified.**

23 Pursuant to 11 USC §362 a creditor must cease all collection action against a debtor  
24 and against property of the bankruptcy estate. Failure to cease collection action is a violation  
25 of the automatic stay and entitles debtors to damages, including punitive damages, for a

26 \_\_\_\_\_  
27 <sup>6</sup>Debtor recently received BPB's response to Debtor's Objection, notwithstanding Debtor's  
28 counsel indicated that Debtor was going to file an amended objection. Debtor has not had  
sufficient time to review the claimed attorney's fees and costs and will supplemental this  
objection to address those portions of BPB's claim.

1 creditor's willful violation.

2 BPB was put on notice of the commencement of this bankruptcy on June 27, 2013, the  
3 petition date, filed a Request For Notice within three days of the bankruptcy filing Doc# 11,  
4 and had clear notice of the bankruptcy and of the automatic stay. Yet, BPB refused and failed  
5 to cease its collection actions against Debtor by not advising Debtor's tenant that post-  
6 petition rental payments should be made directly to Debtor, continuing to intercept rent  
7 payments, filing an unsuccessful motion to determine that such post-petition rents were not  
8 property of the estates notwithstanding authority to the contrary, delaying the turnover of  
9 such funds after receipt of the court's October 7, 2013 order finding such post-petition rents  
10 are property of the estate, not advising Debtor's tenant to direct post-petition rental payments  
11 directly to Debtor after receipt of the court's October 7, 2013 order, and refusing to accept  
12 payments from Debtor. Preliminarily, BPB's violations of the automatic stay have resulted in  
13 damages to Debtor, including but not limited to, damages in the form of attorney's fees and  
14 costs, claims of additional interest and late fees and attorney's fees and costs by BPB, and  
15 punitive damages.  
16

17 **2) BPB Failed to Disclose Known Environmental Issues on The Property**  
18 **While Entering Into Agreements With Debtor and Accepting Payments**  
**and Thereby Caused Debtor Damages.**

19 Debtor, as discussed hereinabove and in its Schedule B, asserts that it has a claim  
20 against BPB for BPB's failure and refusal to disclose to Debtor, prior to, during, and after,  
21 the various agreements between them and while Debtor was making substantial payments to  
22 BPB and others while BPB knew the Property had a material environmental issue.

23 As a result of BPB's non-disclosure and withholding of such material information,  
24 Debtor paid considerable monies to BPB and incurred substantial expenses to bring and keep  
25 BPB current, paid substantial monies to others ready the Property for a tenant and secure a  
26 tenant, and paid substantial monies to ERAS Environmental, Inc. to assist Debtor secure a  
27 No Further Action letter from the County of Santa Clara. In addition, as a result of BPB's  
28 non-disclosure and withholding of such material information Debtor lost a sale of the



1 Property in December 2012, incurred, paid, and/or will incur and/or pay substantial  
2 additional interest to BPB (approximately \$291,689.40 (12 x \$24,307.45, December 2012-  
3 November 2013), substantial additional interest and penalties on outstanding real property  
4 taxes (18% interest and penalties estimated in excess of \$50,000 since December 2012), and  
5 substantial attorney's fees and costs, and may have lost interest and/or profits on the net  
6 proceeds of a sale of the Property.

7  
8 **H. BPB Waived Any Right to Belatedly Backdate Debtor's Payments and  
Charge Default Interest and Late Fees.**

9 Generally, a party may waive its right to enforce certain terms of a contract  
10 through "acts or conduct which naturally and justifiably led the other party to believe that he  
11 has waived the right." *Donicker Corp. v. Pittsburgh Nat'l Bank*, 1994 U.S. App. LEXIS  
12 31528 at \*14 (9th Cir. Guam Nov. 9, 1994) (citation and internal quotation omitted).  
13 "Implied waiver is an equitable doctrine not based in contract." *Id.* at \*15. Waiver exists  
14 when "a party's acts are so inconsistent with an intent to enforce the right as to induce a  
15 reasonable belief that such right has been relinquished . . . Reasonable belief refers to the  
16 belief of the party asserting waiver." *Darling Int'l, Inc. v. Baywood Partners, Inc.*, 2007 U.S.  
17 Dist. LEXIS 50985 (N.D. Cal. July 13, 2007) (internal citations and quotations omitted)(See  
18 also, *Rubin v. L.A. Fe. Sav. & Loan Ass'n* (1984) 159 Cal.App.3d 292, 298; *Knarston v.*  
19 *Manhattan Life Ins. Co.* (1903) 140 Cal. 57, 63).

20 Prior to the filing of the BPB Claim BPB consistently asserted to Debtor, the state  
21 court, and this court specific principal figures and contract interest at 6.5% and did not assert  
22 a claim for default interest. Pre-petition communications between Debtor and BPB, every  
23 state court filing by BPB, and every Bankruptcy Case filing by BPB prior to the BPB Claim  
24 asserted specific principal figures and contract interest at 6.5% and did not assert a claim for  
25 default interest at 8.5% or the right to backdate over three (3) years of payments. BPB did not  
26 notify the Debtor that it was asserting a claim for default interest or intended to belatedly  
27 backdate three (3) years of payments, including backdating Debtor's payment of \$380,661.90  
28



1 in July 2011 to bring the loan current, Debtor's payment of \$413,219 to BPB's for its regular  
2 monthly payment from July 2011 through March 2013 to keep the loan current, and then full  
3 rental payments of \$118,800 (April-June 2013 (\$39,600 x 4)) intercepted by BPB from  
4 Debtor's tenant. Instead, from approximately July 2011 through October 2013 BPB presented  
5 Debtor with documents, engaged in negotiations with Debtor, entered into agreements with  
6 Debtor, presented Debtor with an additional agreement, initiated a state court action, and  
7 filed various pleadings in this Bankruptcy Case which consistently asserted principal figures,  
8 declining principal figures, the application of monthly payments against principal and  
9 interest, and interest at 6.5%. Over the same time period BPB accepted, without objection,  
10 approximately \$912,680.90 to bring the loan current and keep the loan current, and watched  
11 Debtor spend an additional \$240,000 in leasing commissions and secure a tenant, without  
12 asserting a claim for default interest or a right to backdate these payments. BPB's silence  
13 constituted and constitutes an unequivocal waiver of its right to charge default interest and  
14 late fees. See, e.g., *Darling Int'l, Inc. v. Baywood Partners, Inc.*, supra, 2007 U.S. Dist.  
15 LEXIS 50985 at \*54-57 (lack of communication corroborated waiver of right to assert  
16 contract termination); *In re Korn*, 352 B.R. 228, 243-44 (Bankr. D. Idaho 2006) (waiver  
17 based on failure to declare breach or to seek remedies under sale agreement); *Howard J.*  
18 *White, Inc. v. Varian Associates*, 178 Cal.App. 2d 348, 355 (Cal. App. 1st Dist. 1960)  
19 (conduct impliedly waived contract requirement of written change orders); *Varela v. Wells*  
20 *Fargo Bank*, 15 Cal. App. 3d 741, 749 (Cal. App. 3d Dist. 1971) (acceptance of payments by  
21 secured creditor precluded secured creditor from exercising remedies).

22  
23 The principles of waiver and/or estoppel apply to limit the right to charge default  
24 interest retroactively, as BPB now attempts to do. (See, e.g., *In re Sweet*, 369 B.R. 644, 652  
25 (Bankr. D. Colo. 2007) (where predecessor secured party did not exercise right to assess  
26 default interest, subsequent assignee could not retroactively do so); *400 Walnut Assocs., L.P.*  
27 *v. 4th Walnut Assocs., L.P.*, (In re 400 Walnut Assocs., L.P.), 461 B.R. 308, 314 (Bankr.  
28 E.D. Pa. 2011) (failure of predecessor to exercise right to charge compound interest

1 constituted waiver of such right as to assignee who stands in the shoes of predecessor); In re  
2 Harvest Oaks Drive Assocs., LLC, 2011 Bankr. LEXIS 146 at \*29-33 (Bankr. E.D.N.C. Jan.  
3 14, 2011) (discussing issue of assignee's entitlement to retroactive default interest when the  
4 asserted default was "overlooked or, for whatever reason, not asserted by the original  
5 assignor" and holding that assignee was precluded from charging default interest until it itself  
6 provided notice of its intent to do so)).

7  
8 It is plainly unfair for BPB to outwardly agree to Debtor's cure of the loan for  
9 approximately 2 1/4 years through negotiations, agreements, accepted payments, a pending  
10 sale, a lawsuit, and part of a bankruptcy and then ambush the Debtor with substantial claims  
11 for additional principal, default interest, late fees and penalties, and a backdated application  
12 of Debtor's payments—all retroactively. Such penalties should not be borne by the Debtor and  
13 its estate or tolerated and approved by this court.

14 California law recognizes the equitable doctrine of waiver. Waiver may be shown by  
15 conduct, and it may be the result of an act which, according to its natural import, is so  
16 inconsistent with the intent to enforce the right in question as to induce a reasonable belief  
17 that such right has been relinquished. *Howard J. White, Inc. v. Varian Associates*, 178 Cal.  
18 App. 2d 348, 355 (Cal. App.1st Dist. 1960). BPB's conduct evidenced its intent to treat the  
19 loan as cured, not to assert default interest or late fees, or the right to backdate approximately  
20 2 1/4 years of payments. Debtor reasonably relied on its communications with BPB, BPB's  
21 representations, BPB's written communications, BPB's acceptance of payments, the  
22 negotiations with BPB, BPB's state court filings, and BPB's filings in this Bankruptcy Case  
23 regarding the outstanding principal, the applicable interest rate, the cure of the loan, and the  
24 application of payments to principal and interest. Debtor reasonably believed that BPB  
25 accurately and honestly represented the outstanding principal balance, the applicable interest  
26 rate, the application of payments to principal and interest<sup>7</sup>. BPB did not assert default interest

27  
28 <sup>7</sup>Debtor was never asked to assume the loan, was not provided copies of the loan, and had no  
(continued...)

1 or late fees from July 2011 through October 2013 until the filing of the BPB Claim. It was  
2 only after Debtor's payment to BPB of \$380,661.90 in July 2011, Debtor's payment to BPB  
3 of \$413,219 for BPB's regular monthly payment from July 2011 through March 2013,  
4 Debtor's payment of \$240,000 in leasing commissions and the securing of a tenant, BPB's  
5 interception of full rental payments of \$118,800 (April-June 2013 (\$39,600 x 4)), the filing  
6 of a state court action, the commencement of this Bankruptcy Case, four months of this  
7 Bankruptcy Case and several pleadings by BPB, and the filing of Debtor's motion to sell that  
8 BPB asserted a claim to default interest, late fees, and the right to belatedly backdate two and  
9 half (2 ½) years of payments. BPB's belated backdating, as discussed hereinabove, purports  
10 to increase the principal debt owed by BPB by approximately \$214,151.35, add additional  
11 interest and late fees for several years (apparently back to 2009), and bonus itself an  
12 additional \$465,643.30, plus attorney's fees.

13  
14 **I. BPB Must Be Estopped From Belatedly Backdating Debtor's Payments  
and Charging Default Interest and Late Fees.**

15 It is axiomatic that "[a] promise which the promisor should reasonably expect to  
16 induce action or forbearance on the part of the promisee or a third person and which does  
17 induce such action or forbearance is binding if injustice can be avoided only by enforcement  
18 of the promise." Restat 2d of Contracts, § 90. In such instance, "[t]he remedy granted for  
19 breach may be limited as justice requires." Id. See also *Garcia v. World Savings, FSB*, 183  
20 Cal. App. 4th 1031, 1045 (Cal. App. 2d Dist. 2010) (agreement to postpone foreclosure to  
21 enable borrower to refinance). Although no consideration or benefit accrues to the promisor,  
22 "[t]he vital principle is that he who by his language or conduct leads another to do what he  
23 would not otherwise have done shall not subject such person to loss or injury by  
24 disappointing the expectations upon which he acted." Id. at 1041 (*citation and quotation*

---

25  
26  
27 <sup>7</sup>(...continued)  
28 choice but to rely on BPB's representations, oral and written and sworn and unsworn, regarding  
the cure of the loan, the declining principal balance, and the application of the regular monthly  
payments to interest and principal.

1 *omitted).*

2 Here, Debtor relied upon and acted upon BPB's representations when it moved  
3 forward with foreclosure of the Second DOT, took ownership of the real property, negotiated  
4 with and entered into various agreements with BPB, paid BPB \$380,661.90 to cure and  
5 reinstate the loan, paid BPB \$413,219 from July 2011 through March 2013 in regular  
6 monthly payments to keep the loan current, paid leasing commissions of \$240,000 and  
7 secured a tenant, paid BPB \$118,800 (April-June 2013 full rental payments), paid ERAS  
8 Environmental, Inc. ("ERAS") substantial monies to address environmental issues with the  
9 real property (that BPB did not previously disclose to Debtor), defended a state court action  
10 by BPB, responded to BPB's representations to this court, and secured a sale of the real  
11 property. Debtor's action were premised on BPB's consistent representations of the amounts  
12 necessary to bring and keep the loan current, the outstanding principal balance, the interest  
13 rate of 6.5%, the proper allocation of regular monthly payments to principal and interest, and  
14 the absence of any indications or representations that BPB would assert default interest, late  
15 fees, and/or the right to belatedly backdate Debtor's payments, charge default interest and  
16 late fees, and seek to bonus itself approximately \$465,643.30, plus attorney's fees.

17  
18 BPB's conduct falls precisely within the doctrine of estoppel. The Court, in its  
19 equitable discretion, should disallow any belated backdating of Debtor's payment or the  
20 charging of default interest or late fees.

21 **J. BPB Is Not Entitled to Default Interest Or Late Fees Under Applicable**  
22 **Nonbankruptcy Law.**

23 In determining whether the contractual default rate should be applied, the Ninth  
24 Circuit has adopted the majority rule that the bankruptcy court should apply a presumption of  
25 allowability for default rate interest, provided that the rate is not unenforceable under  
26 applicable nonbankruptcy law. (General Electric Capital Corp. v. Future Media Productions,  
27 Inc., 536 F.3d 969, 974 (9<sup>th</sup> Cir. 2008). The default interest and late fee provisions asserted  
28 by BPB bear no relationship to actual damages and are unenforceable under California law.

1 California law has long recognized that a provision for liquidation of damages for  
2 contractual breach, for example a preset late payment fee, can under circumstances be  
3 designed as, and operate as, a contractual forfeiture. *Ridgley v. Topa Thrift & Loan Ass'n*, 17  
4 Cal.4th 970, 977 (Cal. 1998). To prevent such operation, California places limits in  
5 liquidated damage clauses. Under California law, "liquidated damages" means the amount of  
6 compensation to be paid in the event of breach of contract, the sum of which is fixed and  
7 certain by agreement. *Chodus v. West Publishing Co.*, 292 F.3d 992, 1002 (9<sup>th</sup> Cir. 2002).

8  
9 California Civil Code Section 1671 (b) provides, in relevant parts, that "a provision in  
10 a contract liquidating the damages for the breach of the contract is valid unless the party  
11 seeking to invalidate the provision establishes that the provision was unreasonable under the  
12 circumstances existing at the time the contract was made." Under this section, the "liquidated  
13 damages need only bear a reasonable relationship to the range of harm the parties might  
14 reasonably have anticipated when they entered into the contract." In *re VEC Farms, LLC*, 395  
15 B.R. 674, 685 (Bankr. N.D. Cal. 2008); *Ridgley*, supra, 17 Cal.4th at 977; see also *Harbor*  
16 *Island Holdings v. Kim*, 107 Cal.App.4th 790, 799 (Cal.App.4th Dist. 2003) (Fact that lease  
17 at issue was "a commercial lease negotiated by seasoned business entities, and not a  
18 consumer lease between unsophisticated individuals, has no bearing on the result.") and  
19 *Garrett v. Coast & Southern Sav. & Loan Ass'n* (1973) 9 Cal.3d 731, 739 (noting that the  
20 amount set as liquidated damages "must represent the result of reasonable endeavor by the  
21 parties to estimate a fair average compensation for any loss that may be sustained."). In the  
22 absence of such relationship, a contractual clause purporting to predetermine damages must  
23 be constructed as a penalty and is ineffective. *Id.* At 977-98. The party seeking to rely on a  
24 liquidated damages clause bears the burden of proving its enforceability. *Garrett*, supra, 9  
25 Cal.3d at 738.

26 Here, there is no reasonable relationship between any anticipated harm or  
27 administrative costs and BPB's claim for both default interest at 8.5% and late fees and BPB  
28 did not endeavor to estimate the amount of fair compensation for damages-which Debtor

1 submits were none.

2 In In re Charles St. African Methodist Episcopal Church of Boston (“CSAME”), 2012  
3 Bankr. LEXIS 4321 (Bankr. D. Mass. Sept. 18, 2012), the Massachusetts bankruptcy court  
4 considered whether a lender was entitled to pre-petition default interest under Massachusetts  
5 law which, similar to California law, does not permit liquidated damages which do not, at the  
6 time of contracting, represent a reasonable forecast of damages expected to occur in the event  
7 of a breach. Id. at \*24. In CSAME, the loans at issue calculated default interest at the greater  
8 of 18% percent per annum or 5% greater than the then floating prime rate. The court found  
9 that this calculation created two separate default rates including a variable rate equal to the  
10 floating prime rate plus 5 percent which would apply when the floating prime exceeded 13  
11 percent. Id. at \*25. This calculation led the court to believe that the lender did not engage in  
12 any reasonable estimation of its anticipated damages. Similar reasoning applies here where  
13 the Note’s default interest also establishes a floor with increases based on a fluctuating prime  
14 rate.  
15

16 BPB cannot offer any legitimate explanation for its attempt to belatedly backdate  
17 Debtor’s payments and charge default interest and late fees. BPB has not attempted to  
18 calculate any actual harm not already cured by Debtor. In CSAME the court found that the  
19 lender’s argument failed because it did not calculate the rate separately for the particular  
20 loans in question and the lender produced no evidence of having calculated its anticipated  
21 costs with respect to such loans. Id. at \*16. At no time prior to BPB Claim, and inconsistent  
22 with all of BPB’s actions and inactions, did it attempt to calculate its anticipated costs in  
23 assessing default interest for the particular loan in question and, even now, it cannot  
24 reconcile any reasonable relationship between the default interest and its actual damages.  
25 There simply is no rational basis for the penalties BPB is attempting to belatedly assess on  
26 Debtor. In considering the other factors delineated in the Law Revision Commission  
27 Comment to Cal. Civ. Code §1671, Debtor notes that it was not represented by counsel in  
28 negotiations with BPB while BPB was, BPB held a superior bargaining position when

1 negotiating with Debtor, and BPB cannot be allowed to unfairly profit from its belated  
2 attempts to change history and positions. California law precludes BPB from charging  
3 default interest and late fees and attempting to do so belatedly.

4 **K. BPB's Claims For Backdated Principal, Default Interest, and Late Fees Are**  
5 **Barred by The Doctrine of Judicial Estoppel.**

6 Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent  
7 positions, precludes a party from gaining an advantage by taking one position, and then  
8 seeking a second advantage by taking an incompatible position." Whaley v. Belleque, 520  
9 F.3d 997, 1002 (9th Cir.2008) (quoting Rissetto v. Plumbers & Steamfitters Local 343, 94  
10 F.3d 597, 600 (9th Cir.1996)). It is "an equitable doctrine invoked by a court at its  
11 discretion," New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968  
12 (2001) (quoting Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990)), and "is intended to  
13 protect the integrity of the judicial process by preventing a litigant from playing fast and  
14 loose with the courts." Whaley, 520 F.3d at 1002 (quoting Wagner v. Prof'l Eng'rs in Cal.  
15 Gov't, 354 F.3d 1036, 1044 (9th Cir.2004)). Judicial estoppel "generally prevents a party  
16 from prevailing in one phase of a case on an argument and then relying on a contradictory  
17 argument to prevail in another phase." New Hampshire v. Maine, 532 U.S. 742, 749 (2001)  
18 (citing Pegram v. Herdrich, 530 U.S. 211, 227, n.8 (2000)).

19 In determining whether to apply the doctrine, courts typically consider (1) whether a  
20 party's later position is 'clearly inconsistent' with its original position; (2) whether the party  
21 has successfully persuaded the court of the earlier position, and (3) whether allowing the  
22 inconsistent position would allow the party to 'derive an unfair advantage or impose an  
23 unfair detriment on the opposing party.' " United States v. Ibrahim, 522 F.3d 1003, 1009 (9th  
24 Cir.2008) (quoting New Hampshire v. Maine, 532 U.S. at 750-51, 121 S.Ct. 1808). (See also  
25 Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982) (whether the party has  
26 "succeeded in persuading a court to accept that party's earlier position, so that judicial  
27 acceptance of an inconsistent position in a latter proceeding would create 'the perception that  
28



1 either the first or the second court was misled") and In re Hoopai, 581 F.3d 1090, 1097 (9th  
2 Cir. 2009) (the court must consider whether the party against whom estoppel is sought would  
3 "derive an unfair advantage" if not estopped).

4 BPB's belated attempt to avoid its agreement with Debtor, its representations to  
5 Debtor, its representations to the state court, and its representations to this court, after receipt  
6 of substantial monies from Debtor and substantial financial expenditures by Debtor, warrants  
7 the application of judicial estoppel.

8  
9 **L. Additional Nonbankruptcy Law Precludes Enforcement of BPB's Belated  
10 Claims for Default Interest and Late Fees.**

11 In addition to the foregoing, the Court should also consider the tenets of contract law  
12 as applied to the loan agreement and Note. California law again governs. Del Hur, Inc. v.  
13 Nat'l Union Fire Ins. Co., 94 F.3d 548 (9th Cir. 1996). In California, a contractual clause is  
14 unenforceable if it is both procedurally and substantively unconscionable. Lona v. Citibank,  
15 N.A., 202 Cal. App. 4th 89, 109 (Cal. App. 6th Dist. 2011) (citing Armendariz v. Foundation  
16 Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000)) (internal citations omitted). "Absent  
17 unusual circumstances, evidence that one party has overwhelming bargaining power, drafts  
18 the contract, and presents it on a take-it-or-leave-it basis is sufficient to demonstrate  
19 procedural unconscionability . . ." Id. (citing Gatton v. T-Mobile USA, Inc., 152 Cal. App.  
20 4th 571 (Cal. App. 1st Dist. 2007)). Substantive unconscionability "consists of an allocation  
21 of risks or costs which is overly harsh or one-sided and is not justified by the circumstances  
22 in which the contract was made." Dean Witter Reynolds v. Superior Court, 211 Cal.App. 3d  
23 758, 768 (Cal. App. 1st Dist. 1989). And while the determination of unconscionability is  
24 typically found in the context of standard form "adhesion" contracts, this is not a prerequisite  
25 for unconscionability. Harper v. Ultimo, 113 Cal. App. 4th 1402, 1409 (Cal. App. 4th Dist.  
26 2003).

27 Applied here, BPB's attempt to belated backdate Debtor's payments, charge default  
28 interest and late fees, and bonus itself almost \$500,000 after 2 1/4 years is unconscionable.



1 BPB's attempt is onerous and part of a strategy to punish Debtor notwithstanding Debtor  
2 rescued the real property from foreclosure, paid BPB approximately \$912,680.90 to bring the  
3 loan current, reinstate the loan, and keep the loan current through regular monthly payments,  
4 paid substantial sums, including leasing commissions of \$220,000 and environmental  
5 expenses to secure a tenant and a buyer, paid BPB \$3,341,017.00 on November 8, 2013 as  
6 part of Debtor's sale of the real property, and paid substantial property taxes (approximately  
7 \$247,595.95-approximately \$50,000 more than when the Property was originally set to be  
8 sold in December 2012).

9  
10 Because BPB's conduct was and is unconscionable and unenforceable, BPB should  
11 not be permitted to belatedly impose penalties such as additional principal, default interest  
12 and late fees, or backdate Debtor's prior payments. (*See* Restat 2d of Contracts, § 208 ("If a  
13 contract or term thereof is unconscionable at the time the contract is made a court may refuse  
14 to enforce the contract, or may enforce the remainder of the contract without the  
15 unconscionable term, or may so limit the application of any unconscionable term as to avoid  
16 any unconscionable result.")).

17 **M. Breach of Duty of Good Faith and Fair Dealing Bars BPB's Attempt to**  
18 **Belatedly Backdate Debtor's Payments and Charge Default Interest and**  
19 **Late Fees.**

20 Every contract implies on each contracting party a duty to exercise good faith and fair  
21 dealing in the performance and enforcement of a contract. *Sutherland v. Barclays*  
22 *American/Mortgage Corp.*, 53 Cal. App. 4th 299, 314 (Cal. App. 2d Dist. 1997):

23 . . . In general, the covenant imposes a duty upon a party to a contract  
24 not to deprive the other party of the benefits of the contract . . . The  
25 covenant . . . not only imposes upon each contracting party the duty to  
26 refrain from doing anything which would render performance of the  
27 contract impossible by any act of his own, but also the duty to do  
28 everything that the contract presupposes that he will do to accomplish  
its purpose." *Id.* (*internal citations and quotations omitted*).

Here, BPB breached its duty of good faith and fair dealing. It changed its strategy for  
payoff or simply 'sandbagged' Debtor. Courts have noted that such remedies are warranted in

1 the instance of a contract which reflects, among other factors, “unequal bargaining strength  
2 between the parties, an inadequacy of ordinary contract damages or other remedies,  
3 adhesiveness of contract provisions adversely impacting the damaged party which are either  
4 neutral toward or benefit the other, public concerns that parties to certain types of contracts  
5 conduct themselves in a particular manner, the reasonable expectations of the parties or a  
6 fiduciary relationship in which the financial dependence or personal security by the damaged  
7 party has been entrusted to the other.” Mitsui Mfrs. Bank v. Superior Court, 212 Cal. App.  
8 3d 726, 731 (Cal. App. 4th Dist. 1989). The Court should not permit the inequitable award of  
9 backdated principal, default interest, and penalties to a party such as BPB who breached its  
10 duty of good faith and fair dealing.

11 **N. BPB Is Not Entitled To Backdated Default Interest and Late Fees.**

12 Creditors may not receive both default interest and late charges under § 506(b). (In re  
13 Market Center East Retail Property, Inc., 433 B.R. 335, 365 (Bankr. D.N.M. 2010); In re  
14 Clifondale Oaks, LLC, 357 B.R. 883, 887 (Bankr. N.D. Ga. 2006); In re Consolidated  
15 Properties Ltd. Partnership, 152 B.R. 452, 458 (Bankr. D. Md. 1993); In re Kalian, 178 B.R.  
16 308, 312 n. 9 (Bankr. D.R.I. 1995) (*citing cases*)). Such a rule exist because both are  
17 designed to compensate for the same injury, Clifondale Oaks, supra, 357 B.R. at 887.

18 **O. Debtor Reserves the Right to Amend or Supplement this Objection.**

19 Debtor reserve the right to amend or supplement this Objection as further information  
20 becomes known and available to Debtor  
21

22 **IV. Conclusion.**

23 For the foregoing reasons Debtor objects to the BPB Claim.

24 Dated: December 13, 2013

CAMPEAU GOODSSELL SMITH  
/s/ William J. Healy  
William J. Healy